No. 89-1960

IN THE

Supreme Court Of The United States

October Term 1989

EDWARD A. McCONWELL, and
CLAYTON E. DICKEY,

Petitioners,

v.

INTERNATIONAL BUSINESS MACHINES
CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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July 16, 1990.

QUESTIONS PRESENTED

1. Whether this Court should follow its recent decision in *Cooter & Gell v. Hartmarx Corp.*, 58 U.S.L.W. 4764 (June 11, 1990) (No. 89-275), in which the Court decided the same question presented by Petitioners in a way contrary to that urged by Petitioners here.

2. Whether attorneys may be sanctioned under Rule 11 and the inherent power of the court for (1) filing their client's affidavit after being put on notice that their client had contradicted and denied personal knowledge of material assertions in that affidavit in deposition testimony, (2) relying on that affidavit in two briefs that they signed and submitted to the court and (3) submitting additional affidavits containing further inconsistencies in an effort to avoid sanctions.

3. Whether Petitioners have been denied "due process" where the issue of sanctions was addressed at six hearings before the district court, Petitioners and their client filed 180 pages of briefs and seven affidavits in the district court and where Petitioners were afforded, but declined, the opportunity to present live testimony.

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STATEMENT OF THE CASE

Petitioners Edward A. McConwell and Clayton E. Dickey are attorneys who represented two corporate plaintiffs, Security Software of New Jersey, Inc. ("Security Software") and Security Software of Marlton, Inc., and two individual plaintiffs, Peter F. Faltings and James J. Corcoran, in litigation against International Business Machines Corporation ("IBM") brought in the Eastern District of Virginia. That litigation arose from IBM's decision to terminate Security Software's Personal Computer Retail Dealer Contract because Security Software was engaged in making a very large number of "grey market" sales of IBM personal computers, *i.e.*, sales to unauthorized computer dealers, in violation of the contract.

The four plaintiffs each asserted claims against IBM for breach of contract, fraud, conspiracy to injure plaintiffs' business in violation of the Virginia Conspiracy Statute, violation of the New Jersey Franchise Practices Act, violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO") and tortious interference with contract. Plaintiffs sought $43 million in damages, not including the possibility of treble damages both under RICO and the Virginia Conspiracy Statute.

In the course of that litigation, IBM filed a motion for summary judgment seeking dismissal of all claims. That motion was granted with regard to a number of the claims, a directed verdict in IBM's favor was granted on some claims, and IBM subsequently prevailed before a jury on all of the remaining claims. The conduct that led the district court to impose sanctions against Petitioners occurred in the course of their opposition to IBM's motion for summary judgment, in a subsequent motion filed by them seeking modification of the court's order granting partial summary judgment and in their subsequent attempts to avoid sanctions.

Although Petitioners attempt to create the impression that they were sanctioned simply for filing an unexecuted affidavit with the Court, in fact the district court imposed sanctions on Petitioners and Mr. Corcoran, and the Fourth Circuit affirmed that decision, because Petitioners

> (1) filed an unexecuted affidavit of their client, James "C." Corcoran,[1] in the district court that had been drafted by one of the Petitioners and that was not based, as Petitioners concede (*see* Petition at 5), on the witness' personal knowledge;
>
> (2) procured and filed an executed version of that affidavit in an effort to oppose IBM's motion for summary judgment a day after they were put on notice that, in his deposition, the witness had contradicted certain

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[1] Mr. Corcoran's middle initial is "J."

key assertions in the affidavit, assertions that were material to the court's consideration of IBM's motion for summary judgment, and disclaimed any personal knowledge of other key facts asserted in the affidavit;

(3) relied on the affidavit in two briefs that they signed and filed with the court; and

(4) in an effort to avoid sanctions, procured and filed additional affidavits that were inconsistent with the prior testimony but which failed to explain the inconsistencies.

The district court afforded Petitioners and Mr. Corcoran (who has not petitioned for a writ of certiorari) a number of hearings on the issue and more than ample opportunity to explain the inconsistencies. (*See* J.A. at 276.)

On March 28, 1988, the district court issued a written opinion[2] imposing sanctions of $57,581.19, holding that the Corcoran affidavit and deposition testimony were irreconcilable (D. Ct. Op. at 14a), that new affidavits submitted by Petitioners and Mr. Corcoran in opposition to the motion for sanctions contained further unexplained inconsistencies (D. Ct. Op. at 17a), and that the conduct at issue was sanctionable under Rules 11 and 56(g) of the Federal Rules of Civil Procedure and the inherent power of the court to punish bad faith conduct, as recognized in *Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 240 (1975) and other cases (D. Ct. Op. at 18a-24a).

The Fourth Circuit affirmed the district court's decision to impose sanctions but reversed in part the lower court's determination of the amount of the sanctions and remanded for further proceedings. (Ct. App. Op. at 10a.) The Petition

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[2] The district court's opinion below is appended to the Petition beginning at page 11a, and will be referred to in citations herein as "D. Ct. Op.". The opinion of the court of appeals is appended to the Petition beginning at page 1a, and will be referred to in citations herein as "Ct. App. Op.".

for a Writ of Certiorari was filed after the court of appeals decision but before any proceedings in the district court on remand.

ARGUMENT

I.

THIS CASE DOES NOT PRESENT ANY QUESTION WORTHY OF REVIEW BY THIS COURT.

No question of broad application or wide-ranging importance is presented here, and the Petition does not meet the criteria for granting the Writ as set forth in Rule 10 of the Rules of this Court.

In holding that the appropriate standard of review of the decision to impose sanctions was the abuse-of-discretion standard, the Fourth Circuit applied the correct standard. In *Cooter & Gell v. Hartmarx Corp.*, 58 U.S.L.W. 4863 (U.S. June 11, 1990) (No. 89-275), this Court held that the abuse-of-discretion standard is the appropriate standard. *Id.* at 4769. Thus, the first ground asserted by Petitioners is moot.

The other questions presented are entirely fact-based, are not in conflict with any other court of appeals decision, and a decision by this Court would not offer any substantial guidance to, or resolve any conflicts between, the lower courts. Nor do Petitioners contend that the Fourth Circuit has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 10(a).

Each of the questions presented by Petitioners is briefly discussed below.

II.

THE COURT OF APPEALS APPLIED THE APPROPRIATE STANDARD OF REVIEW IN AFFIRMING THE DISTRICT COURT'S IMPOSITION OF SANCTIONS.

In *Cooter & Gell v. Hartmarx Corp.*, 58 U.S.L.W. 4763 (U.S. June 11, 1990) (No. 89-275), the Court held that

> "Rule 11's policy goals also support adopting an abuse-of-discretion standard. The district court is best acquainted with the local bar's litigation practices and thus best situated to determine when a sanction is warranted to serve Rule 11's goal of specific and general deterrence. Deference to the determination of courts on the front lines of litigation will enhance these courts' ability to control the litigants before them. Such deference will streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court; it will also discourage litigants from pursuing marginal appeals, thus reducing the amount of satellite litigation." 58 U.S.L.W. at 4768.

The Court concluded that "an appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination". *Id.* at 4769.

Here, the Fourth Circuit applied the appropriate abuse-of-discretion standard:

> "We find, from the evidence of record, that imposition of sanctions in this case was well within the discretion of the district judge, as such sanctions were based on specific, supportable factual findings, and we accordingly affirm based on the district court's opinion." (Ct. App. Op. at 8a.)

Its decision is entirely consistent with this Court's ruling in *Cooter & Gell*. *See* 58 U.S.L.W. at 4769.

III.

PETITIONERS WERE SANCTIONED UNDER THE INHERENT POWER OF THE COURT AS WELL AS UNDER RULE 11, AND IN ANY EVENT SUCH SANCTIONS WERE APPROPRIATE UNDER RULE 11.

Petitioners contend that they could not, as a matter of law, be sanctioned under Rule 11 because they did not sign the offending affidavit and that

> "[t]he Fourth Circuit apparently affirmed the sanctions solely in reliance on Rule 11 since the only authority cited by the Fourth Circuit in support of its affirmance was its decision in *Stevens v. Lawyers Mut. Liability Ins. Co.*, 789 F.2d 1056 (4th Cir. 1986), which dealt exclusively with Rule 11." (Petition at 19.)

Petitioners' statement is at best misleading. The Fourth Circuit cited the *Stevens* case solely for the proposition that an

> "award [of sanctions] is entitled to deference by a reviewing court and will only be overturned upon a finding of abuse of discretion." (Ct. App. Op. at 8a.)

There is no basis for concluding that the standard of review is any different for an award of sanctions under the inherent power of the court than it is under Rule 11. Thus, the Fourth Circuit's reliance on the *Stevens* case does not support Petitioner's assertion that the court affirmed the sanctions solely on the basis of Rule 11, and in fact it did not.

The Fourth Circuit expressly recognized that "sanctions totaling $57,581.19 were levied against Corcoran and his attorneys pursuant to Rules 56(g) and 11 of the Federal Rules of Civil Procedure *and the inherent power of the Court*" (Ct. App. Op. at 7a; emphasis added), and stated that "we . . . affirm *based on the district court's opinion*" (*id.* at 8a; emphasis added). Thus, there is no question that the Fourth Circuit affirmed the district court's decision imposing sanctions on *all* bases set forth in its opinion.

In any event, Petitioners are properly subject to sanctions under Rule 11 for signing and filing two briefs in the district court that relied upon the offending affidavit. Each of the two Petitioners signed one of those briefs, and this Court's decision in *Pavelic & LeFlore v. Marvel Entertainment Group*, 110 S. Ct. 456 (1989) does not in any way call into question the district court's decision even if it had been based solely on Rule 11.

IV.

THE RECORD REFLECTS THAT PETITIONERS WERE AFFORDED MORE THAN AMPLE OPPORTUNITY "TO BE HEARD" AND WERE NOT DEPRIVED OF "DUE PROCESS".

The imposition of sanctions must comply with the due process requirements of notice and an opportunity to be heard. Here, Petitioners were afforded more than adequate notice (which they do not contest) and numerous opportunities to be heard. The question of sanctions was addressed before the district court at hearings on March 13, 1987, April 10, 1987, September 11, 1987, October 9, 1987, November 6, 1987, and April 29, 1988, and Petitioners and Mr. Corcoran filed 180 pages of briefs and seven affidavits with the district court. (*See, e.g.*, J.A. at 6-9, 64-67, 88-94, 134-62, 179-87, 221-30, 267-78.) For tactical reasons, Petitioners and their client chose not to testify at the hearing on September 11, 1987, even though they had ample notice and a full opportunity to do so. Indeed, they waited until after the district court indicated its intention to award sanctions, and after full briefing, the filing of affidavits and oral argument, to request an "evidentiary hearing". (*See* J.A. at 225.)

In any event, Petitioners have never explained how an "evidentiary hearing" would have benefited them, since the essential facts found and relied upon by the court below are undisputed and indisputable. All the relevant facts are contained in Mr. Corcoran's deposition testimony, the affidavits

filed subsequent to that deposition, and the briefs and transcripts of the hearings on the motions for summary judgment and for sanctions.[3]

Petitioners argue that a trial was necessary to determine which was false, the deposition testimony or the affidavit. They assert that if the deposition testimony was false, there is no basis for sanctions since they did not rely on the deposition. (Petition at 25.) However, as the district court properly held, once a clear conflict exists between a client's sworn deposition testimony and his affidavit, counsel must attempt to resolve the conflict before filing and relying upon the affidavit to defeat a motion for summary judgment. (D. Ct. Op. at 21a.) Not referred to in the Petition is the fact that the district court imposed sanctions in part because Petitioner Dickey and Mr. Corcoran filed additional affidavits in connection with the sanctions question that contained further unexplained inconsistencies with earlier deposition testimony. (*See id* at 17a, 21a.)

Moreover, regardless whether the Corcoran affidavit was literally and objectively "true", Petitioners have conceded all along that it was not based on Mr. Corcoran's personal knowledge. (*See, e.g.*, J.A. at 111-14.) At his deposition, he disclaimed knowledge of the "facts" set forth in his "affidavit", which he stated he had never written nor read completely. (*See, e.g.*, J.A. at 29, 38, 51-54.) Counsel not only drafted the affidavit, but after the affiant disclaimed knowledge under oath in his deposition, they had their client execute it, filed it

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[3] The district court was also highly familiar with both the issues and the litigants, especially since the same court had presided over a trial in a case brought by these same plaintiffs, represented by these same attorneys, against a different defendant raising similar issues only a short time before their case against IBM was commenced. *See Faltings, et al., v. Entre Computer Centers of America, Inc., et al.*, No. 86-256-A (E.D. Va.). As the Advisory Committee Notes to Rule 11 observed,

> "[i]n many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary." Fed. R. Civ. P. 11 advisory committee's notes (1983 amend.).

with the court and twice relied upon it in signed briefs. Under the circumstances, sanctions were not only appropriate they were required. *E.g.*, *Letts v. Icarian Dev. Co.*, No. 74 C 2252, slip op. at 9 (N.D. Ill. Sept. 15, 1980) (LEXIS, Genfed library, Dist file).

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

July 16, 1990.

Respectfully submitted,

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